INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	1
Questions presented	2
Statement	2
Argument	4
Conclusion	11

CONCLUSION

Cases:

Bolling v. *Sharpe*, 347 U.S. 497	11
Camp v. *United States*, 413 F. 2d 419, certiorari denied, 396 U.S. 968	8
Carter v. *Jury Commission*, 396 U.S. 320	5, 6
Dunn v. *Blumstein*, 405 U.S. 330	8
George v. *United States*, 196 F. 2d 445	6
Gorin v. *United States*, 313 F. 2d 641, certiorari denied, 379 U.S. 971	8
Hill v. *Texas*, 316 U.S. 400	9
King v. *United States*, 346 F. 2d 123	6
Peters v. *Kiff*, 407 U.S. 493	9, 10
Thiel v. *Southern Pacific Co.*, 328 U.S. 217	5, 7
United States v. *Allen*, 445 F. 2d 849	6
United States v. *Butera*, 420 F.2d 564	6, 8, 11
United States v. *Dangler*, 422 F.2d 344	8
United States v. *DiTommaso*, 405 F.2d 385	6
United States v. *Duncan*, 456 F.2d 1401, vacated on other grounds, No. 71-6773, October 10, 1972	6, 10

405-406—73

Cases—Continued

	Page
United States v. *Gast*, 457 F.2d 141, certiorari denied, 406 U.S. 969	11
United States v. *Guzman*, 337 F. Supp. 140, affirmed, C.A. 2, No. 72-1524, decided November 8, 1972, pending on petition for a writ of certiorari, No. 72-5837	5, 6, 7
United States v. *Kelly*, 349 F.2d 720	8
United States v. *Kuhn*, 441 F.2d 179	6
United States v. *McVean*, 436 F.2d 1120	6
United States v. *Tantash*, 409 F.2d 227	6
Constitution and Statute:	
United States Constitution:	
Fifth Amendment	2
Sixth Amendment	2, 10
Twenty-sixth Amendment	4, 7
Jury Selection and Service Act of 1968, as amended, 28 U.S.C. 1861 *et seq.*	1
28 U.S.C. 1863(b)(2)	8
28 U.S.C. 1865(b)(1)	2, 8, 10
50 U.S.C. App. 462(a)	2
Miscellaneous:	
H. Rep. No. 1076, 90th Cong., 2d Sess.	10

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-860

RICHARD FREDERICK ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 468 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1972. Pursuant to an order of Mr. Justice Douglas extending the time within which to file a petition for a writ of certiorari, the petition was filed on December 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Jury Selection and Service Act of 1968, as amended, 28 U.S.C. 1861 *et seq.*, is set forth in relevant part at Pet. App. 12a-23a.

QUESTIONS PRESENTED

1. Whether the former 21-year minimum age limit in the Jury Selection and Service Act of 1968, 28 U.S.C. 1865(b)(1), was unconstitutional.

2. Whether the one-year durational residency requirement for federal jury service in 28 U.S.C. 1865 (b)(1) violates the Fifth or Sixth Amendments.

3. Whether the evidence was sufficient to support the jury's guilty verdict, rejecting petitioner's claim of mental irresponsibility.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App.).

The essential facts are undisputed. Petitioner registered with the Selective Service System in 1965, and initially received a student (II–S) deferment. Upon termination of that deferment, he was ordered to report for induction on May 26, 1970 (SSF 53).[1] He reported and completed his preinduction processing (SSF 32–37), but then refused to submit to induction (SSF 39–40). An indictment was returned on August 25, 1971.

Prior to trial, on January 4, 1972, petitioner filed a motion "to strike the petit jury panel and/or to dis-

[1] "SSF" refers to petitioner's Selective Service file; "RT" denotes the reporter's transcript of proceedings in the trial court; "CT" refers to the clerk's transcript on appeal.

miss the indictment" (CT 19–26). Following a hearing, the motion was denied (CT 107). At his trial, petitioner admitted that he had refused to submit to induction.[2] A psychiatrist was called by the defense, and, over the government's objection, testified that petitioner's refusal had been "involuntary" due to a personality disorder.[3] The question of petitioner's

[2] Petitioner testified at trial to the circumstances surrounding his refusal to submit to induction. When he arrived at the induction center, he first notified an officer that he planned to refuse induction (RT 14: 5–7). He thereafter left the induction center (although advised that this was a crime) to consult with a draft counselor (RT 14: 10–25). Petitioner later returned to the induction center, took the physical examination and then refused induction (RT 15). He stated that he understood he was subject to penalties and prosecution for refusing to step forward (RT 17: 4–5), but gave as reasons for his action that he could not participate in military services, that the military represented the greatest threat to the national security, and that environmental studies are the nearest extant approach to the protection of the nation (RT 16: 5–18).

[3] The psychiatrist testified that in December 1971, some seven months after the offense, at the request of defense counsel, he had examined petitioner for a period of approximately two hours (RT 31: 9–25; RT 41: 20–21). On the basis of his examination (RT 32: 1–4), he evaluated petitioner " * * * as being basically an [obsessive] compulsive person" (RT 35: 18–19) with " * * * a very classical manifestation of anxiety" (RT 36: 8). The psychiatrist stated: "The [obsessive], compulsive quality in him that I think is particularly pertinent in this case is his very highly developed sense of what is right and wrong and his absolute need to follow that sense of what is right and wrong. Very systematically following it as far as he possibly could, and that is a very absolute conclusion" (RT 36: 9–14).

The psychiatrist concluded that, considering petitioner's emotional state, the accused did not have the ability to submit to induction (RT 41: 5–8). Petitioner was, in his view, in the same mental condition at the time of the examination as at the time of the offense (RT 43: 2–10). It was the opinion of the psy-

"willfulness" was submitted to the jury and it returned a verdict of guilty. The court of appeals affirmed.

ARGUMENT

1. Petitioner contends here, as he did below, that the grand and petit juries which returned his indictment and verdict were unconstitutionally comprised in that they did not contain a fair proportion of people under 26 years of age and excluded people under 21 years of age.[4] Petitioner was 23 years old at the time of indictment.

A. The essential thrust of petitioner's argument is that ratification of the Twenty-Sixth Amendment on June 30, 1971, guaranteeing to persons "eighteen years of age or older" the right to vote, rendered "constitutionally unreasonable" (Pet. 13) the initial determination by Congress in the Jury Selection and Service Act of 1968 (see Pet. App. 17a) to continue the traditional ineligibility for federal jury service of persons below age 21. But it does not follow from the fact that a person becomes entitled at the age of

---

chiatrist that petitioner was suffering an underlying mental defect which allowed him to function quite well at levels where he felt no duress, but prevented him from functioning in duress situations (RT 41: 22–23; RT 42: 12). But, the psychiatrist also acknowledged that petitioner knew at the time of the violation that a choice was open to him (RT 42: 19–23), and that he exercised that choice in the manner indicated at least in part because of his own conscience, that is, his developed sense of right and wrong (RT 43: 18–24; RT 44: 7–9).

[4] Although petitioner's data concerning alleged under-representation relate to the age group 21–24 (see Pet. App. 3a, n. 1), he extends his argument to 25 year-olds as well (see Pet. 4, n. 2).

eighteen to vote that he also derives from that constitutional privilege, or some other, a fundamental right to serve on juries. As observed in *United States* v. *Guzman,* 337 F. Supp. 140, 144 (S.D.N.Y.), affirmed, C.A. 2, No. 72–1524, decided November 8, 1972, pending on petition for a writ of certiorari, No. 72–5837:

> The right to vote and the right to sit in judgment of others have certain fundamental differences which cannot be overlooked. The act of voting is a personal expression of favor or disfavor for particular policies, personalities, or laws. The voter is motivated by his personal self-interest, or what he considers best for the general populace.
>
> However, when one sits on a jury, he is required to accept and apply the law as the judge gives it to him, whether or not he agrees with it and no matter what his personal feelings are toward the parties in question. He must have the maturity and understanding to do what may be an unpleasant task.

Whether one should be called upon to assume the latter responsibilities when he becomes 15, 18, 21, or some other age, is a judgment for the legislature. See *Carter* v. *Jury Commission,* 396 U.S. 320, 322. Congress, in the 1968 Act, established the minimum age level for federal jury service at twenty-one. In so doing, it did not deprive those accused of criminal activity of "an impartial jury drawn from a cross-section of the community" (*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 220), as petitioner seems to suggest.

Young people, although perhaps susceptible to categorization by age, are not a homogeneous group. As noted by the Second Circuit in *Guzman, supra,* slip op. 359, n. 5, "despite talk of 'generation gaps,' there are great disparities in opinions, attitudes, experiences and life-styles among young people." No showing has yet been made, in this or other similar cases in the federal courts, that the many and varied views and experiences of those under the age of 21 are not adequately represented by people a few years older. Indeed, the authority is virtually all to the contrary. See, *e.g., United States* v. *Duncan,* 456 F. 2d 1401 (C.A. 9), vacated on other grounds, No. 71–6773, October 10, 1972; *United States* v. *Allen,* 445 F. 2d 849 (C.A. 5); *United States* v. *Kuhn,* 441 F. 2d 179, 181 (C.A. 5); *United States* v. *DiTommaso,* 405 F. 2d 385 (C.A. 4); *King* v. *United States,* 346 F. 2d 123 (C.A. 1).[5] Accordingly, the original legislative judgment to set a 21-year minimum age limit for federal jury service has consistently been upheld as constitutional. See *United States* v. *Guzman, supra; United States* v. *McVean,* 436 F. 2d 1120 (C.A. 5); *United States* v. *Tantash,* 409 F. 2d 227 (C.A. 9); *George* v. *United States,* 196 F. 2d 445 (C.A. 9). And cf. *Carter* v. *Jury Commission, supra,* 396 U.S. at 333, n. 29.

[5] The lone exception is *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1). But, as the court below noted (Pet. App. 5a, n. 4), that case involved a significantly larger age group, which prompted the court there to state (420 F. 2d at 570): "We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons—in our case, those between 21 and 34—will be insulated from attack."

As petitioner acknowledges, in April 1972 Congress amended the Jury Selection and Service Act in various respects, and lowered the jury service age to 18 (Pet. App. 22a). This does not mean, or even suggest, that such a change was required by the Constitution.[6] Rather it indicates only that Congress, having reassessed its 1968 position on minimum age requirements, made the considered judgment to draw the line elsewhere. As pointed out by the court below (Pet. App. 2a), it had both "the right and power" to take such action.[7]

B. Petitioner also challenges the method of selecting jurors in the Northern District of California on the basis of voter-registration lists, which are used to refill the jury wheel every four years. This system, he claims, "resulted in the statistical disparities between the proportion of young persons [aged 21 through 25] in the community and their representation on the master jury wheel" (Pet. 13). The court of appeals,

[6] Even assuming *arguendo* that ratification of the Twenty-Sixth Amendment on June 30, 1971 (approximately two months prior to petitioner's indictment) immediately vested the right to jury participation in all persons aged 18–20, some reasonable time was needed to obtain lists of such persons, which were not readily available prior to their registering to vote. See *United States* v. *Guzman*, *supra*, slip op. 360–361. Undeniably, those persons who register to vote after June 30, 1971, will be added to the jury wheel at its next replenishment. So long as there has been no attempt to exclude the new voters from their normal addition, no unconstitutional discrimination has transpired (see *Thiel* v. *Southern Pacific Co.*, *supra*, 328 U.S. at 220).

[7] In view of the fact that the present statutory age limit for jury service is the same as the minimum voting age specified in the Twenty-Sixth Amendment, the issue raised in this petition with regard to the ineligibility of 18–20 year-olds for jury service is of virtually no continuing importance.

noting that petitioner's statistical data are not without deficiencies (Pet. App. 4a), thoroughly considered the jury selection process in the judicial district and concluded that it had not produced a systematic exclusion of young people. For the reasons stated in the opinion below (Pet. App. 6a–9a), on which we rely, we submit that petitioner's arguments were correctly rejected.[8]

2. The second constitutional challenge to the Jury Selection and Service Act concerns the requirement that those eligible for jury service must have "resided for a period of one year within the judicial district" (28 U.S.C. 1865(b)(1)). Petitioner relies primarily on this Court's recent decision in *Dunn* v. *Blumstein*, 405 U.S. 330, striking down a durational residency requirement on the right to vote. But in *Dunn*, and in the other decisions cited by petitioner which invalidated durational residency requirements (Pet. 11–12, n. 8), the challenge was made by a person who had himself been deprived of a specific right because he had not lived in the particular location long enough. That is not the case here. Petitioner has not suggested any reason why the exclusion of new residents from the jury lists for a period of one year would lead to impartial juries who are unrepresentative of the community. He does assert that such an exclusion

[8] The use of voter registration lists as a source for filling the jury wheel is the source presumptively required by the Act (28 U.S.C. 1863(b)(2); Pet. App. 13a), and has been consistently upheld. See *United States* v. *Dangler*, 422 F.2d 344 (C.A. 5); *United States* v. *Butera*, *supra*; *Camp* v. *United States*, 413 F. 2d 419 (C.A. 5), certiorari denied, 396 U.S. 968; *United States* v. *Kelly*, 349 F.2d 720 (C.A. 2)); *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 379 U.S. 971.

"infringes upon the fundamental right of newer members of the community to participate in the governmental process by serving on federal juries" (Pet. 10). But, in the absence of any cognizable prejudice to petitioner due to the durational residency requirement, we do not think he is in any position to challenge on constitutional grounds the exclusion of recent residents.

Petitioner asserts (Pet. 10, n. 7) that this Court's decision in *Peters* v. *Kiff*, 407 U.S. 493, "settles" the standing question. But this case is fundamentally different from *Peters*. There the challenge by a white man to the systematic exclusion of Negroes from jury service was permitted because the practice under attack was contrary both to " 'the Constitution and an Act of Congress passed pursuant to the Constitution * * *' " (407 U.S. at 506 (White, J. concurring, quoting *Hill* v. *Texas*, 316 U.S. 400, 406)). As the plurality opinion by Justice Marshall observed, such a racially discriminatory procedure for selecting jurors failed "to satisfy the elementary requirements of due process" (407 U.S. at 505). And the judgment of the Court in that case allowing standing rested on the concurrence of Justices White, Brennan, and Powell, who concluded that recognizing a broad right of standing would implement the strong federal statutory policy against racially motivated exclusion. Here, by contrast, we do not deal with a qualification requirement that is inherently suspect under the Due Process Clause. And the requirement itself states federal statutory policy in this area. In these circum-

stances, we do not believe it follows from *Peters* that petitioner can be heard to challenge the durational residency requirement on behalf of a group of which he is admittedly "not a member" (Pet. 10, n. 7). He has demonstrated no prejudice to himself, or to others accused of a crime, by virtue of the exclusions from jury service of new residents of the community.

In any event, the challenged requirement is faithful to the letter and spirit of the Sixth Amendment guarantee that those accused of a crime shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed * * *." As the Second Circuit pointed out in *United States* v. *Duncan, supra,* 456 F. 2d at 1406: "Historically one of the virtues of the jury, whether grand or petit, is supposed to be that it is a local body acquainted with local conditions, customs and mores." The durational residency requirement in 28 U.S.C. 1865(b)(1) is intended to protect and preserve that virtue, which is embedded in the Constitution itself. To assure "some substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect" (H. Rep. No. 1076, 90th Cong., 2d Sess., p. 6), Congress has quite reasonably required that members of the jury be selected from those who have resided in the judicial district for at least one year. The court below, therefore, was correct in holding (Pet. App. 2a–3a) that the legislative judgment requiring those who move to a new community to live there for one year before qualifying for federal jury service is not "so un-

justifiable as to be violative of due process" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499–500). See also *United States* v. *Gast*, 457 F. 2d 141 (C.A. 7), certiorari denied, 406 U.S. 969; *United States* v. *Butera, supra*, 420 F. 2d at 573.

3. Petitioner also asks this Court to review the fact question concerning the "willfulness" of his refusal to submit to induction. That issue was, however, submitted to the jury. It heard the testimony by the psychiatrist who had examined petitioner some seven months after the offense had been committed (see n. 3, *supra*). On the basis of its evaluation of that testimony and the other evidence in the case, the jury resolved the fact question against petitioner. There is no cause for review of that finding by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
A. WILLIAM OLSON,
Assistant Attorney General.
ROBERT L. KEUCH,
WILLIAM M. PIATT,
Attorneys.

FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973